IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
September 18, 2006 Session

STEVEN E. SCHRADER v. KATHY H. SCHRADER

Appeal from the Chancery Court for Knox County
No. 153441-2 Daryl R. Fansler, Chancellor

No. E2005-02641-COA-R3-CV - FILED JANUARY 4, 2007

Steven E. Schrader ("Husband") filed a complaint seeking a divorce from Kathy H. Schrader ("Wife") after a 15-year marriage. Wife filed a counterclaim also seeking a divorce. Husband's attorney later withdrew from the case; the attorney stated that he had been unable to communicate with his client for over five months. At some point, Husband moved to a new location, but he failed to inform the trial court, Wife, or Wife's attorney of his new address. This matter was set for trial on July 26, 2004, and, when the date arrived, Husband failed to appear. The trial court proceeded with the trial in Husband's absence. Wife was the only witness. Following the trial, the court entered a final judgment that awarded Wife just under 99% of the marital property. Husband filed a motion to set aside the final judgment, asserting various reasons as to why he was entitled to the requested relief, including an argument that the marital property division was not equitable. The trial court refused to set aside its judgment. We vacate the trial court's division of the marital property and its award of alimony *in solido* because we hold that Wife's proof preponderates against a finding that the division is equitable. The remainder of the trial court's judgment is affirmed. This case is remanded for a new trial on the issue of an equitable division of the marital property and, if necessary, the issue of alimony *in solido*.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed in Part and Vacated in Part; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and D. MICHAEL SWINEY, J., joined.

Charles W. Swanson, Knoxville, Tennessee, for the appellant Steven E. Schrader.

Kirk Andrews and Paul Randal Dillard, Maryville, Tennessee, for the appellee Kathy H. Schrader.

OPINION

I.

In January, 2002, Husband filed a complaint seeking a divorce from Wife. Husband alleged that Wife was guilty of inappropriate marital conduct. In the alternative, he alleged that irreconcilable differences had arisen between the parties. Husband sought an equitable division of the marital estate.

Wife answered the complaint and denied engaging in any inappropriate marital conduct. She filed a counterclaim seeking a divorce from Husband, alleging that it was Husband who was guilty of inappropriate marital conduct. Wife admitted that irreconcilable differences had arisen between the parties. Wife also sought an equitable division of the marital assets.[1]

The next document in the record is a November, 2002, order allowing Wife's attorney to withdraw and granting Wife 30 days to secure new counsel. Wife's new attorney entered a notice of appearance in January, 2003.

In August, 2003, counsel for Husband filed a motion seeking to withdraw from the case. In his motion, he stated that he had attempted, without success, to contact Husband by telephone and letters for several months. He further stated that it had been over five months since his last contact with Husband. The attorney indicated that he had sent Husband a letter informing him that he needed to supply certain late-filed exhibits as requested by Wife during Husband's deposition. Again, there was no response. The trial court entered an order permitting Husband's attorney to withdraw.

In September, 2003, Wife filed a motion, in which she sought an order compelling Husband to supply the late-filed exhibits to his deposition. Following a hearing, which Husband did not attend, the trial court granted Wife's motion and ordered Husband to supply the requested material within ten days. After Husband failed to supply the requested late-filed exhibits, Wife filed a motion seeking to have Husband held in contempt.

The record does not contain any notices to the parties from the clerk and master informing them of a trial date. However, the briefs filed by the parties on appeal indicate that notices setting this matter for trial on July 26, 2004, were sent to the parties. Husband claims, however, that he did not receive his copy of the notice.

On July 21, 2004, Wife filed another motion seeking to have Husband held in contempt. In this motion, Wife claimed that not only had Husband failed to comply with the trial court's previous order, but that he had failed to timely respond to various discovery requests, including supplemental

[1] The parties had no children. As framed by the pleadings, the primary issues were which of the parties was entitled to a divorce and the division of the marital property.

interrogatories and a request for production of documents. Wife again sought an order holding Husband in contempt and requiring him to respond to the discovery. Wife requested an award of attorney's fees and expenses as sanctions in accordance with Tenn. R. Civ. P. 37. The following day, on July 22, 2004, Wife filed a motion requesting that her motion for contempt filed the previous day be set for hearing on July 26, 2004. This latter date was, in fact, the date on which the case had been set for trial. Wife also filed a statement of marital assets and liabilities.

The trial, including a consideration of Wife's motion for contempt, took place as scheduled on July 26, 2004. Husband was not present. No attorney appeared on his behalf. As to the grounds for divorce, Wife testified that she discovered that Husband was having an affair when she found a love letter from Husband's "girlfriend" and other things that Wife found to be suspicious. Wife added that by the time she and Husband formally separated, he had moved out of the marital residence and was living with the other woman. Wife testified that she worked full-time during the marriage, while Husband's employment was sporadic. According to her, Husband was laid off approximately 18 months after they were married and for the next ten years, there was "almost no income from him." Wife testified that she and Husband owned the marital residence and a rental house and that she had paid the mortgages on these two properties the vast majority of the time. The combined equity in the two houses was approximately $75,000. Wife asked the trial court to award both of the properties to her. Wife testified to other assets, including a 401(k) from her employment that was valued at approximately $25,000. She requested that she be awarded the entire 401(k) as well as the parties' Volvo and various bank accounts. Wife added that Husband's parents had recently passed away and that he inherited their home worth $60,000 and bank accounts containing at least $200,000.

At the conclusion of Wife's testimony, the trial court orally granted her request for a sanction pursuant to Tenn. R. Civ. P. 37. Accordingly, the trial court struck Husband's complaint and his answer to the counterclaim. As noted by the trial court, this resulted in Wife being granted a divorce based upon her testimony.

On November 30, 2004, the trial court entered its final judgment, *nunc pro tunc* to July 26, 2004. The trial court awarded Wife alimony in solido and distributed the marital property:

> That the [WIFE] shall be awarded her 401(k) [valued at $25,000].…
>
> That the [WIFE] shall be awarded the marital residence [with equity valued at approximately $45,966].…
>
> That the [WIFE] shall be awarded the rental property [with equity valued at approximately $29,608].…
>
> That the WIFE shall be awarded the following items: the clothes dryer, the television and the recliner [valued collectively at $300].

> That the WIFE shall be awarded the MasterCard and the business Visa. The Wife shall assume all responsibility of these debts [totaling $2,500].…
>
> That the WIFE shall be awarded the 2000 Volvo [valued at $9,000 with equity totaling $4,000,] and shall assume all indebtedness owing of same....
>
> That the HUSBAND shall be awarded the Honda Accord [valued at $3,000].…
>
> That the WIFE shall be awarded her money market account, business checking account and her personal checking account [with a combined value of $3,800].…
>
> That the WIFE shall be awarded the Computer and shall assume and pay any indebtedness owing on same.…
>
> That the [HUSBAND] shall be responsible for the debt owed to the parties' accountant [totaling at least $1,800] and he shall hold the [WIFE] harmless of same.
>
> That the HUSBAND shall pay the WIFE's attorney fees in the amount of $4,075.25 as alimony in solido.

(Paragraph numbering in original omitted).

On December 1, 2004, the trial court entered an order in accordance with its oral ruling at trial and struck Husband's complaint and answer to the counterclaim. The trial court also found Husband in contempt for failing to comply with the court's previous order. The trial court did not impose a monetary sanction against Husband.

By December 22, 2004, Husband had secured the services of a new attorney and had filed a motion to set aside the final judgment. In his motion, Husband claimed that after he filed the complaint for divorce, the parties considered reconciling and participated in marriage counseling. Because of the potential for reconciliation, Husband claimed that he directed his first attorney to dismiss the complaint, after which he terminated the attorney's services. Wife also discharged her attorney. At this point, according to Husband, he believed that the case was over. Unbeknownst to Husband, Wife continued to pursue her counterclaim and retained new counsel. Husband claimed that all documents sent to him following the discharge of his attorney were sent to the address of Husband's now deceased parents. Husband maintains that he never received any of these documents, including the motion for contempt or the notice setting a trial date on July 26, 2004. Husband claims that he did not know there had been a hearing until he received, at his correct

address, two quit claim deeds sent to him for his signature. Husband then promptly retained new counsel. Husband asserts that had he received the notice setting the matter for trial on July 26, 2004, he would have been present for the hearing. Husband also claims the property distribution was not equitable in that Wife was awarded assets valued at $165,000, and he was awarded assets valued at $3,000. Husband further claims that the Tennessee Rules of Civil Procedure do not require a party to produce "late-filed exhibits" to depositions. According to Husband:

> The Order entered October 17, 2003, ordered Plaintiff to produce "late-filed exhibits from the depositions," which was the relief sought by the motion for which this Order was entered. It is respectfully urged that there is no requirement that a party produce late-filed exhibits to a deposition. This has become a practice among attorneys but it is respectfully submitted that there is no provision in the Tennessee Rules of Civil Procedure or otherwise to require any party or witness to submit "late-filed exhibits" to a deposition.…[2]

A hearing on Husband's motion to set aside the final judgment was held in July, 2005. At the hearing, Husband argued that the final judgment was essentially a default judgment and Husband did not receive the required five day notice as mandated by Tenn. R. Civ. P. 55.01. The trial court disagreed, stating:

> [T]he case was not disposed of by default.… It came on for trial. And one side appeared and the other side did not. There was no motion [for default] filed. It was a trial date of July 26 of '04.… I can't make [Husband] appear.… All I can do is tell him I'm going to have a trial on a certain date and invite him to attend. If he chooses to do so, then we'll proceed with a[n] adversary proceeding. If he doesn't, then I just have to take the proof that's there and proceed with it.

Counsel for Husband stated that Husband was prepared to testify that he did not receive any of the notices. Husband's attorney then informed the trial court that immediately following the parties' separation, Husband was living with his parents and that was the address initially provided to the court and opposing counsel. Husband then moved from that address. However, mail was still being sent to the address of Husband's parents and it was for this reason that Husband did not

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[2] We note that even if Husband is correct that the trial court should not have compelled him to produce these "late-filed exhibits," an assertion we do not have to address in this case, that argument nevertheless should have been directed to the trial court at the initial hearing on Wife's motion to compel production of these documents. Once the trial court ordered Husband to produce these documents, Husband was required to comply with that order even if it was not in accordance with the Rules of Civil Procedure as he claims. *See* ***Johnson v. Johnson***, 165 S.W.3d 640, 646 n.2 (Tenn. Ct. App. 2004)("[I]n ***State v. Jones***, 726 S.W.2d 515 (Tenn. 1987), our Supreme Court reaffirmed the principle that with proper jurisdiction, 'even though the trial judge's order is erroneous and is reversed on appeal, an adjudication of contempt for failure to obey that order will be sustained.' *Id*. at 517.").

receive any of the notices. The trial court rejected this argument and denied the motion to set aside the final judgment stating, in part, as follows:

> I'm going to deny the motion to set aside the final decree. The Court heard testimony on this matter. It came on for trial, it was set for trial. Numerous pleadings were filed in this case after [Husband's first attorney] withdrew in August of 2003. [Husband's first attorney] set forth in detail his attempts to maintain contact with his client…. As of August the 7th, 2003, [Husband's attorney] was unable to contact him. Even despite telephone calls, letters, advising that he needs to supply certain late-filed exhibits as requested and so forth. It's incumbent upon the parties to make sure that either the lawyer or the Court has the proper address. Because [Husband] instituted this action, it's certainly incumbent upon him to make sure that it's concluded or that he has everyone advised of his proper address. This matter was filed in January of 2002. Two years later the final hearing was held.…

Following the hearing, the trial court entered an order denying Husband' motion to set aside the final judgment. The trial court also clarified the final judgment by noting that while Wife was awarded the marital residence and the rental property, she also was responsible for the associated mortgages on these two properties.

II.

Husband appeals and, after obtaining new counsel yet again, raises two issues, which, taken verbatim from his brief, are as follows:

> 1. Whether the trial court erred in refusing to set aside its judgment obtained at a hearing at which the Husband was not present when the trial court declined to hear proof in explanation of the Husband's absence at trial.
>
> 2. Whether the trial court abused its discretion in making an equitable distribution of the marital estate by awarding 99% of the net value of the estate to the Wife and 1% of the net value of the marital estate to the Husband.

III.

In this non-jury case, our standard of review is *de novo* upon the record of the proceedings below; however, the record comes to us with a presumption of correctness as to the trial court's factual determinations that we must honor unless the evidence preponderates against those findings.

Tenn. R. App. P. 13(d); ***Wright v. City of Knoxville***, 898 S.W.2d 177, 181 (Tenn. 1995). Our review of questions of law is *de novo* with no presumption of correctness attaching to the trial court's conclusions of law. ***Campbell v. Florida Steel Corp.***, 919 S.W.2d 26, 35 (Tenn. 1996).

IV.

Initially we must address Husband's argument in his brief that the trial court entered a default judgment against him. Very recently, in ***Sandalwood Properties, LLC v. Roberts***, No. E2006-01163-COA-R3-CV, 2006 WL 3431939, at *3 (Tenn. Ct. App. E.S., filed November 29, 2006),[3] we rejected a similar argument and concluded that a party's lack of attendance at trial does not convert a judgment into a default judgment. We stated that we were

> compelled to disagree with the Tenants' designation of the Circuit Court's judgment … as a 'default judgment.' It does not follow from the mere fact that the Tenants were absent from the hearing … that the judgment entered against them was a default judgment.

See also ***Harper v. Harper***, No. E2002-01259-COA-R3-CV, 2003 WL 192151, at *4 (Tenn. Ct. App. E.S., filed January 29, 2003), *no appl. perm. appeal filed*, ("Wife's absence at trial does not magically convert the final judgment into a default judgment. We reject Wife's argument that a default judgment was entered in this case."). Because Husband's motion in the instant case was filed within 30 days of entry of the judgment, we will treat his motion as a motion for a new trial under Tenn. R. Civ. P. 59. *See* ***Sandalwood***, 2006 WL 3431939, at *3. We utilize the abuse of discretion standard when reviewing a trial court's denial of a motion for a new trial. ***Sandalwood***, 2006 WL 3431939, at *4 (citing ***Loeffler v. Kjellgren***, 884 S.W.2d 463, 468 (Tenn. Ct. App. 1994)).

V.

The first issue as stated by Husband is twofold. He first claims the trial court erred when it declined to hear his testimony at the hearing on his motion to set aside the final judgment. Second, he argues the trial court erred when it refused to set aside the final judgment because it was "obtained at a hearing at which Husband was not present."

At the hearing on the motion to set aside the final judgment, Husband's attorney explained the various reasons why Husband was not present at trial and why he did not respond to documents that had been mailed to his parents' address. The trial court addressed each of the arguments advanced by Husband's attorney. We fail to see how the trial court committed error, much less a reversible one, when it refused to allow Husband to testify to essentially the same things his attorney had just said to the court. No offer of proof was made indicating that Husband had anything to testify to that had not already been brought to the trial court's attention and addressed by and rejected

[3] At the present time, the period of time for filing a Tenn. R. App. P. 11 application for permission to appeal to the Tennessee Supreme Court has not passed in the ***Sandalwood*** case.

by that court. Because *all* of Husband's points were addressed by the trial court, we find no error in the court's failure to hear Husband testify to facts that the court had assumed were true but had concluded were legally insufficient to warrant the relief requested by him.

We do not believe the trial court abused its discretion when it refused to set aside the final judgment because Husband was not present at the trial. In ***Tareco Properties, Inc. v. Morriss***, No. M2002-02950-COA-R3-CV, 2004 WL 2636705 (Tenn. Ct. App. M.S., filed November 18, 2004), *no appl. perm. appeal filed*, this Court was called upon to decide whether a Tennessee trial court properly dismissed an action to enforce a judgment rendered by a federal district court in Texas. The defendant argued that the Texas judgment was not valid because he had not received proper notice of the case being removed to federal court. This argument failed with the federal district court in Texas as well as the United States Court of Appeals for the Fifth Circuit, which latter court stated as follows:

> [W]e agree with the district court that any lack of actual notice and opportunity to be heard was due primarily to Morriss' own failure to monitor the litigation, clarify his apparent *pro se* status, and notify the courts and the parties of an address at which he could be served. Because Morriss has failed to show that he met his own procedural obligations in state or federal court, he can not reasonably complain now that the FDIC's failure to serve him amounts to a prejudicial, constitutional error. Morriss cannot reap a windfall from circumstances for which he is ultimately responsible. *Cf. New York Life Insurance Co. v. Brown*, 84 F.3d 137, 142-43 (5th Cir. 1996). Consequently, we affirm the order of the district court.

Tesoro Savings & Loan v. Gold Park Development, No. 02-40814, 64 Fed. Appx. 417, 2003 WL 1529269 (5th Cir. 2003). We ultimately concluded that the Texas federal court judgment was entitled to enforcement. ***Tareco Properties***, 2004 WL 2636705, at *12.

We agree with the reasoning of the trial court in the instant case and the Fifth Circuit in ***Tesoro***. More specifically, we believe Husband, who initiated this lawsuit, had an affirmative obligation to keep the trial court and, when he had one, his attorney informed of his current whereabouts. Husband is the author of his own misfortune and cannot be heard to complain that the trial court erred when it proceeded in his absence. It necessarily follows that the trial court did not abuse its discretion when it denied Husband's motion to set aside the final judgment based upon Husband's absence from the trial.

VI.

Husband next claims that the trial court erred when it refused to set aside the final judgment because the division of marital property was not equitable. In ***Watson v. Watson***, No. E2005-00369-

COA-R3-CV, 2005 WL 3533293 (Tenn. Ct. App. E.S., filed December 27, 2005), *no appl. perm. appeal filed*, this Court explained:

> In a divorce case, the trial court is charged with the task of making an equitable division of the marital property and debt without regard to fault. Tenn. Code Ann. § 36-4-121(a) (2005). The trial court is under no obligation to divide the parties' marital property equally, but rather equitably, for "[t]he division of the estate is not rendered inequitable simply because it is not mathematically equal, or because each party did not receive a share of every item of marital property." *King v. King*, 986 S.W.2d 216, 219 (Tenn. Ct. App. 1998) (citation omitted). In dividing marital property, courts are required to allocate interest in a manner consistent with the relevant statutory factors set forth in Tenn. Code Ann. § 36-4-121(c). *Brown v. Brown*, 913 S.W.2d 163, 168 (Tenn. Ct. App. 1994).

Watson, 2005 WL 3533293, at * 3 (footnote omitted). As noted by us in ***Watson***, a trial court, when making an equitable division of marital property, is to consider – to the extent pertinent – the following factors set forth in T.C.A. § 36-4-121(c) (2005):

> (1) The duration of the marriage;
>
> (2) The age, physical and mental health, vocational skills, employability, earning capacity, estate, financial liabilities and financial needs of each of the parties;
>
> (3) The tangible or intangible contribution by one (1) party to the education, training or increased earning power of the other party;
>
> (4) The relative ability of each party for future acquisitions of capital assets and income;
>
> (5) The contribution of each party to the acquisition, preservation, appreciation, depreciation or dissipation of the marital or separate property, including the contribution of a party to the marriage as homemaker, wage earner or parent, with the contribution of a party as homemaker or wage earner to be given the same weight if each party has fulfilled its role;
>
> (6) The value of the separate property of each party;
>
> (7) The estate of each party at the time of the marriage;

> (8) The economic circumstances of each party at the time the division of property is to become effective;
>
> (9) The tax consequences to each party, costs associated with the reasonably foreseeable sale of the asset, and other reasonably foreseeable expenses associated with the asset;
>
> (10) The amount of social security benefits available to each spouse; and
>
> (11) Such other factors as are necessary to consider the equities between the parties.

T.C.A. § 36-4-121(c).

The trial court, in denying Husband's motion to set aside the final judgment, stated that there was "testimony [at trial] about . . . the contributions of the parties to the assets that were marital assets." The trial court made no further comments about Husband's claim that the division of marital property was inequitable. The statement of assets and liabilities filed by Wife shortly before trial reflects that the net marital assets total $106,374. Of that amount, Wife received $105,174, or 98.87%, and Husband received $1,200, or 1.13%. When the alimony *in solido* award for the attorney's fees of Wife, *i.e.*, $4,075.25, is factored in, Husband leaves the marriage with a *negative* estate of $2,875.25.

Taking Wife's testimony at face value, we agree that certain of the factors do tend to favor Wife, such as the contributions of the parties to the acquisition of the marital assets and the value of Husband's separate property. Nevertheless, after considering Wife's testimony in light of all of the pertinent factors, we do not believe that awarding Wife 98.87% of the marital assets while leaving Husband in a negative position of $2,875.25 can be characterized as equitable. Therefore, the trial court erred when it failed to grant Husband's motion to set aside the final judgment on the basis that the marital property distribution was not equitable. We vacate the marital property division as set forth in the final judgment and remand for a new trial. Because an award of alimony *in solido* can be closely tied to the marital property distribution, we also vacate the award of alimony *in solido*. On remand, the trial court is to reconsider the award of alimony *in solido* after it has equitably divided the marital property. We note that the trial court's granting of a divorce to Wife as well as the finding that Husband was in contempt and the sanctions imposed therefor have not been put at issue on this appeal and those rulings remain intact.

VI.

The judgment of the trial court is affirmed in part and vacated in part. This cause is remanded to the trial court for further proceedings consistent with this opinion. Costs on appeal are taxed one-half to the appellant, Steven E. Schrader and one-half to the appellee, Kathy H. Schrader.

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CHARLES D. SUSANO, JR., JUDGE